

**BENSA SDN. BHD. (IN LIQUIDATION)
- BY ITS LIQUIDATOR**

v.

**MALAYAN BANKING BERHAD
DAMANSARA UTAMA BRANCH
& ANOR.**

HIGH COURT, JOHOR BAHRU
TUAN JAMES FOONG CHENG YUEN J.
[ORIGINATING MOTION NO. 25-20
OF 1992]
1 FEBRUARY 1993

COMPANY LAW: Company in liquidation - Liquidators seeking return of assets of company - Assets deposited with second respondents as collateral security via Memorandum of Deposit cum Letter of Guarantee/Authority - Whether guarantee can be a debenture falling within s. 108 Companies Act 1965 entitling registration as a charge - Whether there was undue preference of creditors under s. 293(1) Companies Act - Whether Advocate can represent liquidator without consent of the Court - Section 236(1)(e) Companies Act - Whether liquidator requires sanction of the Court before bringing an action - Section 236(2) & (3) Companies Act.

The applicant, the liquidator of a company, applied for an order that the first respondent refund to the company a sum of money placed on fixed deposit account with the first respondent by the company.

The Company, prior to its winding-up, was awarded a construction contract, and a Performance Bond to cover the company's due performance and completion of the said contract was obtained by the company from the second respondent.

The second respondent in consideration of and as collateral for the issuance of the Performance Bond, obtained the deposit of the fixed deposit receipt issued by the first respondent to the company and a Memorandum of Deposit cum Letter of Guarantee/Authority executed by the company in its favour and proceeded to register it as a charge with the Registrar of Companies.

The second respondent was required to make payment under the Performance Bond as the company had defaulted on its obligations and took steps to realise the fixed deposit deposited with them by the company as collateral.

a The liquidator claimed that:

- (1) The sum under the fixed deposit deposited with the second respondent was not a secured debt under s. 292(1) of the Companies Act and therefore, must be returned to the liquidator for distribution in accordance with s. 292 of the Companies Act.
- b** (2) There was undue preference created by the company in depositing the fixed deposit as a collateral with the second respondent and therefore, such acts were void under s. 293 of the Companies Act.
- c** (3) The disposition of the property of the company was made after the commencement of the winding-up by the Court and was void unless otherwise ordered by the Court as provided for under s. 223 of the Companies Act.

d It was also raised during the course of the trial that Counsel for the liquidator had no *locus standi* under s. 236(1)(e) of the Companies Act and that the actions of the liquidator in bringing the motion to Court was void under s. 236(2) & (3) of the Companies Act.

Held:

e [1] The Memorandum of Deposit cum Letter of Guarantee/Authority contained all the elements of an obligation, covenant, undertaking or guarantee to pay. It was a security granted by the company to the second respondent and as such was properly registered as a charge under s. 108(3)(a) of the Companies Act. As the charge was duly registered it was a secured debt and did not fall within the distribution priorities of unsecured debts as stated in s. 292 of the Companies Act.

f [2] The creation of the fixed deposit collateral could not be said to have shown, in the absence of any evidence to the contrary, an intention of the parties at the material time to confer a preferential priority or advantage over other creditors. The transaction took place more than six months before the presentation of the winding-up petition thus annulling the presumption of such intention.

g [3] The disposition of the fixed deposit was already completed by the act of depositing the fixed deposit receipt together with the Memorandum of Deposit cum Letter of Guarantee/Authority with the second respondent. The fixed

h

i

**Bensa Sdn. Bhd. (In Liquidation) - By Its Liquidator v.
Malayan Banking Bhd. Damansara Utama Branch & Anor.**

[1993] 2 CLJ

James Foong Cheng Yuen J.

69

deposit being an asset of the company was in the possession of the second respondent before the winding-up of the company and the transaction was not void under s. 223 of the Companies Act.

[4] Section 236(1)(e) of the Companies Act lays down a requirement that a liquidator must obtain the authority of the Court or of the committee of inspection to appoint an Advocate to assist him and when challenged, proof must be tendered that such authority does exist. The appointment of Counsel for the liquidator in the absence of such authority was void.

[5] The liquidator can commence actions but subject to the approval of the Court. The acts of the liquidator in bringing this motion to Court was not void under s. 236(2) & (3) of the Companies Act.

[Motion dismissed with costs]

Cases referred to:

British India etc. Co. v. IRC [1881] 7 QBD 165 (*refd*)
Levy v. Abercorris Co. [1887] 37 Ch.D. 260 (*refd*)
Edmonds v. Blaina Co. [1887] 36 Ch.D. 215 (*refd*)
Illingworth v. Houldsworth [1904] AC 345 (*refd*)
Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1988] 2 MLJ 449 (*foli*)
Bah Heng Hong Sdn. Bhd. v. The Provisional Liquidator Choong Shin Cheong & Anor. [1992] 3 CLJ 1421 (*foli*)

Legislation referred to:

Bankruptcy Act 1967, s. 53(1)
Companies Act 1965, ss. 4, 108(1), (3)(a)-(j), 111(2), 223, 236(1)(e), (2) & (3), 292(1)(b), (d) & (e), (4), 293(1) & (2)
Bills of Sales Ordinance 1950

For the applicant - Ong Ban Chai with Phang Wee Min; M/s. Ong Ban Chai & Co.

For the second respondent - S.Y. Lai; M/s. S.Y. Lai & Associates

JUDGMENT

James Foong Cheng Yuen J:

This is an application by the applicant, the liquidator of a private limited company known as Bensa Sdn. Berhad (hereinafter shall be referred to as the company), for an order that the 1st respondent, the Malayan Banking Berhad (hereinafter shall be referred to as the Bank) do refund to the company a sum of RM115,000 being money placed on fixed deposit account with the Bank by the company together with appropriate interest. For the placement of the fixed deposit a receipt was issued by the Bank

a in favour of the company. (This fixed deposit receipt I shall hereinafter refer to as the FD).

At the hearing of this application the Bank did not reply to the application but instead left the matter entirely to the 2nd respondent, the Malayan British Assurance Berhad (hereinafter shall be referred to as the Ins. Co.).

b The background of this case is as follows. The company was awarded a contract to construct superstructural works for 2 blocks of flats for the Urban Development Authority (hereinafter shall be referred to as UDA). As commonly required, a performance bond to cover the company's due performance and completion of the said contract was obtained by the company from the Ins. Co. in favour of UDA up to a sum of RM757,515.41.

c As consideration for the issuance of the Performance Bond, the Ins. Co. obtained *inter alia* from the company as collateral the deposit of the FD. Corresponding with the deposit of this FD, the company executed in favour of the Ins. Co., a Memorandum of Deposit cum Letter of Guarantee/Authority dated 13 May 1987 all relating to the FD. With these, the Ins. Co. proceeded to register the aforesaid as a charge with the Registrar of Companies presumably in accordance with s. 108(1) of the Companies Act. A certificate of registration of this charge was issued by the Registrar pursuant to s. 111(2) of the Companies Act on 24 December 1987.

d On 3 April 1988, a petition was presented in the High Court at Johor Bahru to wind-up the company and on 27 April 1989 the company was wound-up by the said Court.

e On 13 August 1989, the liquidator in this case was appointed for the company and he proceeded to demand from the Bank for the return to the company the sum of RM115,000 placed under the FD.

f In the meantime, the company having defaulted in completing the said contract with UDA had their agreement terminated for breach by UDA who in turn claimed from the Ins. Co. under the Performance Bond. To this the Ins. Co. paid out a sum of RM357,515.41 to UDA. In turn, the Ins. Co. took steps to realise the FD deposited with them by the company as a collateral. This was resisted by the Bank on various grounds and is at present subject to a separate civil suit filed in the High Court at Kuala Lumpur.

g

h

i

For the time being, the Bank and the Ins. Co. seem to be of a common mind and have joined hands in warding off this claim by the liquidator before proceeding to settle their own disputes after this case.

The liquidator's claim is mainly on the following grounds,

- (i) that the sum of RM115,000 under the FD deposited with the Ins. Co. is not a secured debt under s. 292(1) of the Companies Act and therefore, must be returned to the liquidator for distribution in accordance with s. 292 of the Companies Act;
- (ii) that there was undue preference created by the company in depositing the FD as a collateral with the Ins. Co. and therefore, such acts are void under s. 293 of the Companies Act;
- (iii) and that the disposition of the property of the company (that is, the FD) was made after the commencement of the winding-up by the Court and is therefore void unless otherwise ordered by the Court as provided for under s. 223 of the Companies Act.

The Ins. Co. in reply argued that the FD was a fixed charge duly registered and therefore falling within the category of a secured debt. As a secured debt it has priority over unsecured debts as provided by s. 292(1) of the Companies Act.

Further, there was no undue preference as alleged by the liquidator since at the creation of the collateral, the company was solvent and in a sound financial position; there was no intention of the parties to create any preferential treatment to the Ins. Co. except that of a usual commercial transaction.

As to the last allegation, Counsel for the Ins. Co. replied that the disposition of the FD receipt was done before the commencement of the winding-up of the company.

In the course of the argument of this case, a very important point that has great effect and significance to the first issue arose out of an assertion by the liquidator's Counsel that the transaction whereby the FD was placed as a collateral with the Ins. Co. cannot be registered as a charge under any of the provisions of s. 108(3) of the Companies Act. Such being the case, the charge so registered is void and has no effect as a secured debt.

a In order to determine this point, I append below the type of charges so provided for under s. 108(3) of the Companies Act that can be registered;

- (a) a charge to secure any issue of debentures;
- (b) a charge on uncalled share capital of a company;

b (c) a charge on shares of a subsidiary of the company which are owned by the company;

c (d) a charge or an assignment created or evidenced by an instrument which if executed by an individual within West Malaysia and affecting property within West Malaysia would be invalid or of limited effect if not filed or registered under the Bills of Sale Ordinance 1950;

- (e) a charge on land wherever situate or any interest therein;

d (f) a charge on book debts of the company;

(g) a floating charge on the undertaking or property of a company;

- (h) a charge on calls made but not paid;
- (i) a charge on a ship or aircraft or any share in a ship or aircraft; and

e (j) a charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

Of the aforesaid only 2 types are of significance to this case. The first being under s. 108(3)(a), "a charge to secure any issue of debentures" and, the second under s. 108(3)(g) "a floating charge on the undertaking or property of a company".

f It is argued that if it is a floating charge it may fall within s. 292(4) of the Companies Act where, it is not only an unsecured debt but, also ranked lower in priorities to other unsecured debtors such as those in s. 292(1)(b), (d) & (e) of the Companies Act relating to wages, salaries, remuneration and employment benefits of the employees of the company.

In order to determine this point, one must conduct a careful perusal of the transaction and instrument that created this collateral which subsequently led to its registration as a charge by the Registrar of Companies. This document is the Memorandum of Deposit cum Letter of Guarantee/Authority.

h

In this document which is exhibited as LKC6 in the affidavit of the Ins. Co. (Encl. 7) (of which I shall hereinafter refer to as LKC6), I find that it bears the following heading;

i

**Bensa Sdn. Bhd. (In Liquidation) - By Its Liquidator v.
Malayan Banking Bhd. Damansara Utama Branch & Anor.**

[1993] 2 CLJ

James Foong Cheng Yuen J.

71

Memorandum of Deposit
Letter of Guarantee/Authority

In the operative part, it begins with;

In consideration of your issuance of an Insurance Guarantee Against Advance Payment (for works) for the sum of RM757,515.41 to UDA for (the said contract), we Bensa Sdn. Bhd. of No. 85A, SS21/37, Damansara Utama, Petaling Jaya, hereby deposit with you Fixed Deposit Receipt No. 005410 made out in our favour from Malayan Banking Bhd. Damansara Utama, Petaling Jaya for a total sum of RM115,000 as security for the payment to you on demand of all monies now or hereafter owing by us together with interest thereon up to date of payment in respect of the Guarantee.

This type of instrument, has of late, become increasingly in use due to insistence by developers and owners demanding Performance Bonds to be supplied by contractors to guarantee up to a certain amount of money the due performance and obligations of the contractors on the works undertaken by them. This in turn has affected the insurance industry who are by far the largest supplier of such Performance Bonds. Again, in turn they requested various securities from the contractors, one of which is the type stated aforesaid.

The next question to be asked is whether LKC6 is a 'debenture' falling within the category as provided for under s. 108(3)(a) of the Companies Act.

As early as the 19th century the English Judges found difficulty in defining this term 'debenture'. As observed by Lindly J. in *British India etc. Co. v. IRC* [1881] 7 QBD 165,

... what the correct meaning of 'debenture' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures.

Again in *Levy v. Abercorris Co.* [1887] 37 Ch.D 260, Chitty J. expressed a similar view;

I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art.

However, the same judge Chitty J. in the case of *Edmonds v. Blaina Co.* [1887] 36 Ch.D 215 did describe 'debenture' as follows;

a The term itself imports a debt - an acknowledgement of a debt - and speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used. I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security.

b

To my mind this 19th century definition of Chitty J. above, to which at first he could not give any precise legal definition, ought to be given a more liberal outlook to meet the modern day needs where the sphere of business has increased substantially due to modern technology and communication. In the present day, a wide range of forms and instruments are introduced to meet the ever changing needs of modern day commerce and for this, the term 'debenture' should also include besides 'debt' any obligation, covenant, undertaking or guarantee to pay or any acknowledgment thereof.

d

In fact s. 4 of our Companies Act defines 'debentures' to include 'debenture stock, bonds, notes and any other securities of the corporation whether constituting a charge on the assets of the corporation or not'. An obligation, covenant, undertaking or a guarantee to pay such as that in LKC6 would certainly fall within the last category of this definition "any other securities". In this respect, I find that LKC6 is a debenture. It contains the elements of an obligation, covenant, undertaking or guarantee to pay. It is a security granted by the company to the Ins. Co. and as such is properly registered as a charge under s. 108(3)(a) of the Companies Act. As the charge is duly registered it is a secured debt and does not fall within the distribution priorities of unsecured debts as stated in s. 292 of the Companies Act.

e

I cannot agree with the contention that LKC6 creates a floating charge, thus falling within s. 108(3)(g) of the Companies Act. A floating charge as defined in *Illingworth v. Houldsworth* [1904] AC 345 is "ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to effect". In this case, the security created is over a fixed property, that of the FD. It does not float with the properties of the Companies since the property itself in this case is in the hands of the Ins. Co.

h

i

I shall now proceed to deal with the second contention of the liquidator. This relates to the undue preference created by the company in depositing the FD with the Ins. Co. which it is contended is thus void under s. 293 of the Companies Act. If it is void, such property must be returned to the liquidator.

Section 293(1) of the Companies Act must be read together with s. 53(1) of the Bankruptcy Act 1967 as is in line with the Supreme Court judgment in *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ 449.

In order to qualify under s. 53 (1) of the Bankruptcy Act and made applicable to s. 293 (1) & (2) of the Companies Act, I shall accept the 5 conditions to be fulfilled as laid down in an earlier case decided by me - *Bah Heng Hong Sdn. Bhd. v. The Provisional Liquidator Choong Shin Cheong & Anor.* [1992] 3 CLJ 1421. These are;

- (1) that the transaction in question took place within 6 months prior to the commencement of the winding-up;
- (2) that it satisfies the description of one of the types of transaction mentioned in s. 53 (1) of the Bankruptcy Act;
- (3) that it took place at a time when the company was insolvent;
- (4) that the person in whose favour the transaction was effected stood in the relation of creditor to the company; and
- (5) the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding-up.

Of the 5 conditions I find that only (2) and (4) are fulfilled while the rest are not satisfied. From the evidence adduced on affidavits, I find that LKC6 was created on 13 May 1987, while even earlier, on 17 April 1986 the company had passed a resolution approving the creation of the FD collateral in favour of the Ins. Co. All these are well before the date of the presentation of the winding-up petition against the company which was on 3 April 1988.

When the aforesaid transaction took place, the company was very solvent as contended by the Ins. Co.'s Counsel. It was about to or had received as an advance payment a sum of RM757,517.41 from UDA in pursuance to its

a contract works. Such being the case there is no evidence that the company was insolvent at the material time.

The transaction that took place between the company and the Ins. Co. is to my mind a normal straightforward commercial dealing as is practised in the usual course of such business. The creation of the FD collateral cannot be said to have, in the absence of any evidence to the contrary, an intention of the parties the material time to confer a preferential priority or advantage over other creditors. In any event, as stated earlier, the transaction took place more than 6 months before the winding-up petition was presented thus annulling the presumption of such intention.

Based on the aforesaid, I therefore reject the liquidator's second contention.

d As for the third contention of the liquidator, I cannot agree that the disposition of the FD was made after commencement of the winding-up by the Court. The disposition of the FD was already completed by the act of depositing the FD receipt together with LKC6 with the Ins. Co. The FD being an asset of the company was passed onto the hands and was in the possession of the Ins. Co. way before the winding-up of the company. Such being the case, I do not think that the transaction is void under s. 223 of the Companies Act.

f One further point that arose during the course of trial was the allegation that Mr. Ong Ban Chai, Counsel for the liquidator has no *locus standi* in these proceedings under s. 236(1)(e) of the Companies Act. Further, the actions of the liquidator in bringing this motion to Court is void under s. 236(2) & (3) of the Companies Act.

g Section 236(1)(e) of the Companies Act states as follows:

The liquidator may with the authority either of the Court or of the committee of inspection appoint an advocate to assist him in his duties.

h There is no evidence of such authority granted by the Court or by the committee of inspection. Mr. Ong Ban Chai of course argued that though the Court's permission was not obtained, the committee of inspection could grant such authority. This to him should be an internal affair of the company. I cannot accept this contention in the absence of any evidence to show that the

i

committee of inspection has granted such authority. Section 236(1)(e) of the Companies Act clearly lays down such a requirement and when challenged, proof must be tendered that such authority does exist and one cannot just by a mere wave of the hand dismiss it as an internal arrangement.

As for s. 236(2) of the Companies Act which involves various activities of the liquidator in carrying out his duties to wind-up the affairs of the company and distribute its assets, the Court shall as provided by s. 236(3) of the Companies Act have only a control over such matters. "Control" unlike "authority" as stated in s. 236(1) of the Companies Act is that it (the liquidator) can commence actions but subject to the approval of the Court. As for "authority", one cannot even begin to commence unless authority or permission is granted. As for this contention, I find that the acts of the liquidator in bringing this motion to Court is not void under s. 236(2) & (3) of the Companies Act but, the appointment of Ong Ban Chai as an Advocate to assist the liquidator is.

Based on the reasons stated aforesaid, I dismissed the liquidator's motion with costs.

a COCOA MERCHANT LIMITED

v.

K. J. JAYARAMAN

HIGH COURT, PULAU PINANG
DATO' ABDUL HAMID BIN HJ.

MOHAMED J.

[CIVIL SUIT NO. 24-60-85 & 24-307-85]
7 MAY 1992

b

c

d

e

PRACTICE & PROCEDURE: Application to cross-examine deponent of affidavit - Deponent plaintiff's solicitor - Delay in making application - Whether application should be allowed - Defendant filing further affidavit - Whether further affidavit should be admitted - Admission of fresh evidence - Discretion of Court.

The defendant applied to dismiss the plaintiff's action for want of prosecution, which application was dismissed. The defendant applied for further argument and applied to cross-examine the solicitor for the plaintiff who had sworn affidavits on behalf of the plaintiff. The plaintiff raised objection to the defendant's application and further objected to the inclusion of the defendant's affidavit filed after decision on the application to dismiss for want of prosecution was given but before the hearing of further argument.

Held:

f

[1] Whilst the practice of solicitors themselves filing contentious affidavits should be discouraged, the fact that it is done is not a ground for cross-examining the solicitor. Whether a deponent should be cross-examined or not depends on the contents of the affidavit and not on who the deponent is.

g

[2] The application was made too late in the day. The affidavits in question were referred to in the course of argument in chambers. To allow the defendant to cross-examine now would amount to allowing the defendant to adduce fresh oral evidence before the hearing of further argument.

h

[3] The admission of fresh evidence or new affidavit at the further argument stage is discretionary and the circumstances in which fresh evidence can be admitted on appeal are applicable in admitting fresh evidence at further argument stage.

i

[Plaintiff's application dismissed. Defendant's preliminary objection upheld].